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AN OBJECTIVE SOLUTION TO AN AMBIGUOUS PROBLEM: DETERMINING THE OWNERSHIP OF CLOSED CONTAINERS DURING A CONSENSUAL SEARCH

INTRODUCTION

The police have long suspected Clemenza and Vito of running guns.[1] During a stakeout, Officer McCluskey notices them talking through the windows of their respective apartments, which face each other on opposite sides of an alley. He then sees Clemenza toss a bag to Vito. The next day, Officer McCluskey arrives at Vito's apartment, and a woman named Carmela answers the door. She explains that she owns the apartment and gives Officer McCluskey her unqualified consent to search it. After looking around, Officer McCluskey discovers a spare bedroom and a closet strewn with men's and women's clothing, men's shoeboxes, and a backpack. Officer McCluskey opens the backpack and discovers a cache of guns. If this hypothetical search had taken place within the jurisdiction of the U.S. Court of Appeals for the Second or Seventh Circuits, Carmela's consent would have likely extended to the backpack because it did not obviously and exclusively belong to another; the guns would be admitted into evidence. However, if the same search had taken place within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit, Officer McCluskey would have had to discontinue his search upon finding the backpack and cure the ambiguity surrounding the backpack's ownership; the evidence would be suppressed.

When a police officer obtains consent to search a residence from an individual who has the apparent authority to give it, that consent generally extends to containers within the premises that the officer reasonably perceives as belonging to the consenting individual.[2]

1. The anecdote and character names are inspired by THE GODFATHER PART II (Paramount Pictures 1974), directed by Francis Ford Coppola.

2. *E.g.*, Glenn v. Commonwealth, 642 S.E.2d 282, 285 (Va. Ct. App. 2007) ("A grant of consent to search premises includes consent to search closed containers found within the premises unless the officers have reliable information that the container is not under the control of the person granting consent." (quoting 27 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 641.44 (3d ed. 2006))); *see also* State v. Odom, 722 N.W.2d 370, 373 (N.D. 2006) ("Specific consent to search every container is not needed when consent to search a room is given." (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991))).

However, when an officer comes across a container of even mildly ambiguous ownership, the circuit courts are split as to whether he may proceed with the search.[3] The Second and Seventh Circuits permit the officer to search any containers that do not obviously belong to someone other than the consenting party.[4] This "obviousness" standard is an objective determination that examines whether a reasonable officer would think that the container "obviously" and "exclusively" belongs to another individual.[5] The Sixth Circuit, however, requires the officer to discontinue his search and cure any ambiguity that he encounters.[6] This "ambiguity" standard is a subjective determination that looks not only to the beliefs and intentions of the officer, but also to the peculiarities of the factual circumstances.[7]

This Comment argues that courts should follow the standard adopted by the Second and Seventh Circuits and extend a resident's open-ended consent to closed containers discovered within the premises, except for those that obviously do not belong to the resident.[8] When an officer encounters some measure of ambiguity, courts should not unreasonably impede his search—conducted under a resident's blanket consent—by requiring additional ex ante clarification regarding the container's ownership.[9] Such a rule would essentially freeze the legitimate exercise of police authority, spark an inestimable amount of litigation over hairsplitting ambiguities, and make officers unduly fearful of the unintended legal consequences lurking under every lid.

This Comment proceeds in three parts. Part II provides a brief history of the Fourth Amendment and the apparent authority doctrine, a summary of an individual's legitimate expectations of privacy in containers, and an overview of the split between the circuits regarding the search of closed containers.[10] Part III critiques the ambiguity standard employed in the Sixth Circuit and advocates for the obviousness

3. *See infra* notes 89–139 and accompanying text.

4. *See infra* notes 94–115 and accompanying text.

5. *See, e.g.*, United States v. Snype, 441 F.3d 119, 136–37 (2d Cir. 2006) (finding no obvious and exclusive ownership because the bag was not marked and was discovered in a room containing a wide variety of personal items).

6. *See infra* notes 116–39 and accompanying text.

7. *See, e.g.*, United States v. Waller, 426 F.3d 838, 846 (6th Cir. 2005) (finding sufficient ambiguity to suppress the evidence when police knew that the defendant had stored some personal items in the consenting party's apartment).

8. *See, e.g.*, *Snype*, 441 F.3d at 136 (applying the obviousness standard); United States v. Melgar, 227 F.3d 1038, 1041–42 (7th Cir. 2000) (same).

9. *Melgar*, 227 F.3d at 1042 (refusing to impose such a burden upon police).

10. *See infra* notes 13–139 and accompanying text.

standard employed in the Second and Seventh Circuits.[11] Finally, Part IV provides courts with workable rules that identify and define the attributes of obviousness and examines the obviousness standard's impact upon society's interest in quick and efficient searches.[12]

II. BACKGROUND

The Fourth Amendment to the U.S. Constitution contains two restrictions on government searches: they must be reasonable and supported by a warrant.[13] However, not all governmental searches are subject to Fourth Amendment scrutiny.[14] The Supreme Court originally interpreted the Amendment strictly, extending its protections only to physical intrusions upon traditionally protected areas.[15] However, in *Katz v. United States*, the Court expanded the Fourth Amendment's protection to areas in which the target of the search can claim a reasonable expectation of privacy.[16] The Supreme Court adopted a two-part test to address this supplemental inquiry.[17] First, an individual must demonstrate "an actual (subjective) expectation of privacy"; second, the individual's "expectation [must] be one that society is pre-

11. *See infra* notes 140–212 and accompanying text.

12. *See infra* notes 213–42 and accompanying text.

13. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). One influential commentator has suggested that the reasonableness requirement may be the more significant of the two clauses. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (noting that the Framers focused their attention on the unreasonableness of eighteenth-century "general warrants" rather than warrantless arrests and searches, which draw contemporary Fourth Amendment scrutiny).

14. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

15. The Court's jurisprudence originally relied upon common law notions of trespass. United States v. Jones, 132 S. Ct. 945, 949 (2012); *see also* Olmstead v. United States, 277 U.S. 438, 466 (1928) ("Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.").

16. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). Although the majority opinion did not mandate this approach, it is now well-established law. Allison M. Lucier, Comment, *You Can Judge a Container by Its Cover: The Single-Purpose Container Exception and the Fourth Amendment*, 76 U. CHI. L. REV. 1809, 1811 n.7 (2009); *see also* United States v. Chadwick, 433 U.S. 1, 8 (1977) ("[I]t would be a mistake to conclude . . . that the Warrant Clause was therefore intended to guard only against intrusions into the home.").

17. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also* Lucier, *supra* note 16, at 1811 & n.7 (citing California v. Greenwood, 486 U.S. 35, 39 (1988)).

pared to recognize as 'reasonable.'"[18] In *Katz*, for example, the Court understood a person's entering a public telephone booth and closing the door behind him to be a sufficiently reasonable manifestation of privacy to implicate the Fourth Amendment.[19]

After determining that the government intruded upon an area that is constitutionally protected or that reserves a reasonable expectation of privacy, the Fourth Amendment requires a search of that area to be reasonable and supported by a warrant.[20] Although the Supreme Court has "firmly established" that warrantless searches are presumptively unreasonable,[21] the police may circumvent the warrant requirement by obtaining an individual's voluntary consent to search his belongings.[22] Upon obtaining consent, the reasonableness of a search becomes a balance of the consenting individual's privacy interests and the interests of the government.[23] As the individual's privacy expectations increase, the government's actions must serve an even greater public interest in order to justify an intrusion.[24]

Thus, the search of a closed container based upon the apparent authority of a third party's consent is "situated at the intersection of two distinct [aspects] of Fourth Amendment jurisprudence."[25] The first aspect involves the nature and source of that consent and whose pri-

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18. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Supreme Court recently made clear that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Jones*, 132 S. Ct. at 952.

19. *Katz*, 389 U.S. at 352 (majority opinion) ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

20. U.S. CONST. amend. IV.

21. *E.g.*, Groh v. Ramirez, 540 U.S. 551, 559 (2004); *see also Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . .").

22. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). For an interesting analysis of how federal district courts regularly assess voluntariness, see Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192 (2006). Sutherland details several factors that are germane to the burden upon law enforcement to obtain valid consent. *See also* discussion *infra* Part III.A.1.

23. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

24. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 561–62 (1976) (noting that, while the privacy interest in the home is especially high, automobiles are significantly different and that the minimal intrusion upon a motorist's interests are outweighed by the public's interest in border enforcement).

25. Noah Stacy, Comment, *Apparent Third Party Authority and Computers: Ignorance of the Lock Is No Excuse*, 76 U. CIN. L. REV. 1431, 1433 (2008) (engaging in a similar discussion with respect to third-party consent to search a computer).

vacy interests it implicates.[26] This aspect is fraught with the potential for constitutional missteps: an officer must establish the individual's authority to consent,[27] be mindful of objections from other residents,[28] and ensure that the individual's consent is voluntarily given.[29] The second aspect involves the heightened expectations of privacy that courts generally attribute to closed containers.[30] The following sections address both aspects. The first section discusses the development of the apparent authority doctrine under the guise of third-party consent.[31] The second section examines an individual's legitimate expectations of privacy in closed containers.[32] Finally, the third section discusses how courts have attempted to reconcile these important aspects of Fourth Amendment jurisprudence by developing different standards to which law enforcement officers must conform their conduct.[33]

A. The Development of the Apparent Authority Doctrine

The Supreme Court has long recognized that a third party's consent—the consent of an individual other than the residence's primary occupants—can render a warrantless search reasonable if it was freely given and supported by sufficient authority.[34] While a third party's authority to consent to a search might seem objectively obvious to an officer when the resident answers the door, various living arrangements and unusual factual circumstances can precipitate unforeseen constitutional consequences.[35] Therefore, the Supreme Court has developed the doctrine of apparent authority in order to allow officers to effectively execute their duties without letting a single good-faith mistake unravel their efforts. A review of *United States v. Matlock*, *Illinois v. Rodriguez*, and *Georgia v. Randolph* illustrates the

26. A third party's consent may implicate not only his own privacy interests, but also the privacy interests of another individual with some connection to the residence. *See* United States v. Taylor, 600 F.3d 678, 681 (6th Cir. 2010) (discussing the actual, common, and apparent authority of third parties).

27. *See infra* notes 36–57 and accompanying text.

28. *See infra* notes 58–69 and accompanying text.

29. *See infra* notes 157–62 and accompanying text.

30. *See, e.g.*, United States v. Fultz, 146 F.3d 1102, 1105 (9th Cir. 1998) (discussing legitimate expectations of privacy in containers); United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (discussing legitimate expectations of privacy in a locked footlocker).

31. *See infra* notes 34–73 and accompanying text.

32. *See infra* notes 74–88 and accompanying text.

33. *See infra* notes 89–139 and accompanying text.

34. *See infra* notes 36–57 and accompanying text.

35. *See, e.g.*, *infra* notes 46–50 and accompanying text (describing a situation in which officers confronted a woman who—though not a resident—opened the door to an apartment, possessed keys to the apartment, and referred to the apartment as her own).

underpinnings, application, and limitations of the apparent authority doctrine.

1. United States v. Matlock

The concept of third-party consent stems from joint authority over property.[36] For instance, if two people have access to a bag, each assumes the risk that the other will permit someone else to look inside it.[37] Thus, in *Matlock*, the Court determined that an individual who is not the target of a search could nevertheless consent to that search so long as he "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[38]

In *Matlock*, the defendant's girlfriend shared a bedroom with the defendant, slept there regularly (including the night before the search), and used a dresser in the room.[39] The Court concluded that these facts were sufficient to establish common authority over the premises,[40] noting that two or more individuals with "joint access or control" over property should reasonably recognize that they have "assumed the risk" of the other consenting to a search of that property.[41] However, the Court reserved judgment—as it historically had—on the issue of apparent authority; namely, whether the Court would uphold the search on the sole basis of the officer's reasonable belief that the girlfriend had sufficient authority over the premises to consent to a search.[42]

2. Illinois v. Rodriguez

Despite its initial reticence, the Supreme Court ultimately adopted the doctrine of apparent authority in *Rodriguez* and permitted the police to rely upon a third party's consent to search a residence when they reasonably, although mistakenly, believed that the third party had the authority to give it.[43] The Court noted that, while the burden of establishing such authority rests upon law enforcement,[44] "further inquiry" as to authority is only required when a reasonable person

36. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 740 (1969) ("Since [the third party] was a joint user of the bag, he clearly had authority to consent to its search.").

37. *Id.* at 740.

38. United States v. Matlock, 415 U.S. 164, 171 (1974).

39. *Id.* at 175–76.

40. *See id.* at 177.

41. *Id.* at 171 n.7.

42. *See id.* at 177 n.14; *see also* Stoner v. California, 376 U.S. 483, 488 (1964) (expressly rejecting the apparent authority doctrine).

43. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

44. *Id.* at 181.

would doubt the truth of an individual's explicit assertion that she lives in the area to be searched.[45]

In *Rodriguez*, the police arrested the defendant in his apartment after a woman, who had lived there for several months, consented "to unlock[ing] the door with her key."[46] The woman referred to the apartment as "'our' apartment"[47] and indicated that she kept some of her belongings there.[48] The defendant moved to suppress all evidence seized during the arrest, claiming that the woman did not possess sufficient authority to consent to the entry.[49] The trial court agreed, considering that she was an "infrequent visitor" who could not invite guests to the apartment, that she had moved out some of her possessions, and that her name did not appear on the lease.[50]

While the Supreme Court agreed that the woman obviously lacked common authority,[51] it upheld the search under the doctrine of apparent authority.[52] In doing so, the Court rejected the defendant's contention that government officers must be factually correct in their judgment,[53] instead requiring only that their assessment be reasonable under the circumstances.[54] The Court noted that, "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part."[55] In adopting and applying an objective reasonableness standard to the determination of apparent authority to consent, the Court advised that "sufficient probability, not certainty, is the touchstone of reasonableness"[56] and that "law enforcement officials must be expected to apply their judgment" under the circumstances.[57]

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45. *Id.* at 188.

46. *Id.* at 179.

47. *Id.* In fact, she had moved out a month earlier, but failed to disclose that fact to the police. *Id.* at 181.

48. *Id.* at 179.

49. *Rodriguez*, 497 U.S. at 180.

50. *Id.* However, she testified at the preliminary hearing that the defendant had given her the key. *Id.* at 181.

51. *Id.* at 182 ("[T]he Appellate Court's determination of no common authority over the apartment was obviously correct.").

52. *Id.* at 186.

53. *Id.* at 184.

54. *Id.* at 188 ("As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" (alteration in original) (internal quotation marks omitted)).

55. *Rodriguez*, 497 U.S. at 186 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

56. *Id.* at 185 (quoting Hill v. California, 401 U.S. 797, 804 (1971)).

57. *Id.* at 186.

3. Georgia v. Randolph

The Supreme Court's holding in *Randolph* effectively limited an officer's ability to rely on a third party's authority to consent by giving overriding weight to a present resident's express refusal.[58] In *Randolph*, the police accompanied a woman to her and her husband's house, where she volunteered that there were "items of drug evidence" inside.[59] After her husband refused to permit the police to search the premises, they turned to his wife, who eagerly offered her consent.[60] Despite the husband's objection, the police entered his house, observed contraband, and subsequently arrested him.[61]

In determining whether the wife's consent could vitiate the husband's objection, the Court's central inquiry was "whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection."[62] It asserted that "widely shared social expectations" are a "constant element" of Fourth Amendment reasonableness and that the facts must be analyzed in accordance with the prevailing social practice.[63] For instance, while a guest need not inquire about some "exceptional arrangement" between common tenants,[64] no reasonable person would construe one resident's invitation to enter as sufficient against the other's express refusal.[65] The Court extended this reasoning to law enforcement despite the government's countervailing interests.[66]

The Court drew a "fine line" between a present, objecting co-tenant and one who may be asleep in the next room.[67] In justifying this distinction, the Court displayed its distaste for requiring law enforcement to take additional "affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent."[68] The Court noted that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if [the Court]

58. Georgia v. Randolph, 547 U.S. 103, 120 (2006).

59. *Id.* at 107.

60. *Id.*

61. *Id.*

62. *Id.* at 121.

63. *Id.* at 111.

64. *Randolph*, 547 U.S. at 111–12 ("[A]lthough some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular household's rules before accepting an invitation to come in.").

65. *Id.* at 113.

66. *Id.* at 115.

67. *Id.* at 121 (referring to the defendant in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), who was asleep when his girlfriend consented to a search of his apartment).

68. *Id.* at 122.

were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received."[69]

In summary, the Supreme Court has long recognized the reasonableness of a warrantless search when it is conducted with the voluntary consent of the search's target.[70] Additionally, a third party may consent when he "possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected."[71] Although the police can rely upon the apparent authority of a consenting individual, as determined by a reasonable, objective standard,[72] that reliance is limited in the presence of a nonconsenting resident who expressly refuses them entry.[73]

B. Legitimate Expectations of Privacy in Containers

While the Supreme Court has always extended rigorous Fourth Amendment protection to "the sacred threshold of the home,"[74] federal circuit courts have afforded a seemingly higher degree of protection to certain kinds of containers *within* the home.[75] In *United States v. Block*, the U.S. Court of Appeals for the Fourth Circuit explained that individuals commonly associate certain containers with their most intimate expectations of privacy:

> Common experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that the law's "enclosed spaces"—mankind's valises, suitcases, footlockers, strong boxes, etc.—are frequently the objects of his highest privacy expectations, and that the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently in public places or in places under the general control of another.[76]

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69. *Id.*

70. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

71. United States v. Matlock, 415 U.S. 164, 171 (1974).

72. *See Rodriguez*, 497 U.S. at 188.

73. *See Randolph*, 547 U.S. at 120.

74. Baith v. State, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991) (internal quotation marks omitted); *see also* Michigan v. Clifford, 464 U.S. 287, 296–97 (1984) ("We frequently have noted that privacy interests are especially strong in a private residence."); Payton v. New York, 445 U.S. 573, 585–86 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (quoting United States v. U.S. District Court, 407 U.S. 297, 313 (1972))).

75. *See, e.g.*, United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) ("While authority to consent to search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area.").

76. *Id.*

Thus, when one consents to the search of his home, that consent does not necessarily extend to every container found within it. Containers that are commonly understood to hold personal effects will be subject to heightened privacy interests that may give pause to a consensual search.[77]

Block is the seminal decision addressing an individual's expectations of privacy in secured containers. There, a woman permitted the police to enter her home in order to search for the subject of a warrant.[78] The police subsequently observed contraband and a locked footlocker in her son's bedroom and, after allegedly obtaining her consent to search the footlocker, decided to forcefully open it.[79] The Fourth Circuit ultimately held that, while the mother could consent to a search of her son's room, her authority did not extend to "every discrete enclosed space capable of search within the area."[80] However, while "each such enclosed space stands on its own bottom for this purpose,"[81] not every closed container achieves a heightened expectation of privacy.[82] "[P]ockets in clothes, unsecured shoeboxes, and the like" do not qualify for heightened protection after the police have received a person's open-ended consent to search the area in which those objects are located.[83] Therefore, in assessing the privacy expectations of certain containers, the nature of the container—or the way in which it is secured—is generally considered a dispositive factor.

The Fourth Circuit's conclusion accords with the Supreme Court's decision in *Katz*, which requires a manifested expectation of privacy by the defendant and society's reasonable recognition of that expectation.[84] The decisive inquiries in *Block* were whether the container was secured and whether it was commonly used for preserving the privacy

77. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977) ("Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.").

78. *Block*, 590 F.2d at 537.

79. *Id.*

80. *Id.* at 541. The Fourth Circuit further supported its reasoning by citing to other circuits that have reached a similar result with respect to a suitcase, a cabinet, an overnight bag, and a desk. *Id.*

81. *Id.*

82. *Id.* at 541 n.8.

83. *Block*, 590 F.2d at 541 n.8.

84. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* California v. Greenwood, 486 U.S. 35, 39–40 (1988) ("An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.").

of its owner.[85] The court determined that, by locking the footlocker, the son had manifested an expectation of privacy within a space to which the "[c]ommon experience of life" lends the highest Fourth Amendment protection.[86]

The Supreme Court has largely agreed with the Fourth Circuit's assessment in the context of automobiles. The Court has bestowed an expectation of privacy to certain containers within vehicles when their owner sufficiently manifested that expectation.[87] The Court has also concluded that when an individual consents to a search of her vehicle, it is "objectively reasonable for the police to conclude that the general consent . . . include[s] consent to search containers within that car."[88] While the law in the automobile context is well settled, circuit courts have struggled to analogize these principles to the context of a home. Accordingly, the circuits have developed two standards that attempt to reconcile an individual's open-ended consent with the heightened expectations of privacy associated with certain containers inside a residence.

C. *The Circuit Split Between the Obviousness and Ambiguity Standards*

In *Illinois v. Rodriguez*, the Supreme Court mandated an objective standard to assess an individual's apparent authority to consent to a search of a residence.[89] However, this standard has caused "appreciable entropy among the circuits."[90] After acquiring consent to search a residence from an individual with apparent authority, it is unclear whether police may construe that consent as extending to closed containers of ambiguous ownership.[91] While some courts, such as the Second and Seventh Circuits, have looked to whether or not a container *obviously* did not belong to the consenting party,[92] the Sixth Circuit has required further inquiry on the part of law enforcement when presented with any amount of ambiguity as to the container's

85. *Block*, 590 F.2d at 541 n.8.

86. *See id.* at 541.

87. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977) (concluding that a repository of personal effects commands a higher expectation of privacy than an automobile).

88. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (extending the driver's consent to paper bags lying on the vehicle's floor).

89. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

90. United States v. Taylor, 600 F.3d 678, 686 (6th Cir. 2010) (Kethledge, J., dissenting).

91. *Compare Taylor*, 600 F.3d at 685 (requiring officers to resolve ambiguity before proceeding with a search), *with* United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987) (requiring the defendant to prove that the container was obviously his).

92. *See, e.g.*, United States v. Snype, 441 F.3d 119, 136 (2d Cir. 2006); United States v. Melgar, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

ownership.[93] As a result, the circuits reach different conclusions under similar circumstances.

1. *The Obviousness Standard*

The Second and Seventh Circuits, by adopting the obviousness standard, have extended a resident's open-ended consent to closed containers, with the exception of those that obviously do not belong to that resident.[94] In the absence of an officer's positive knowledge that a container belongs to another[95] or some clear manifestation of privacy,[96] the resident's initial blanket consent is not limited by some menial measure of ambiguity.

a. The Second Circuit's Approach: *United States v. Snype*

In *Snype*, the police executed a warrant for the defendant's arrest at his girlfriend's apartment.[97] After removing the defendant, the police obtained the girlfriend's consent to search her residence, during which they found a knapsack, a red plastic bag, and an open box containing cash.[98] The police subsequently opened the knapsack and bag and discovered incriminating evidence.[99] After concluding that the girlfriend voluntarily consented to the search,[100] the court addressed whether her consent to search the apartment extended to the closed containers within it.[101]

The Second Circuit first noted that "her open-ended consent would permit the search and seizure of any items found in the apartment with the exception of those 'obviously' belonging to another person."[102] In its analysis, the court relied upon *United States v. Zapata-Tamallo*.[103] There, a host was held to have the apparent authority to consent to a search of his guest's duffel bag, despite the fact that an officer had seen the guest carry the same bag into the apartment, because that fact alone "was insufficient to prove that the bag obviously

93. *See, e.g.*, *Taylor*, 600 F.3d at 685; United States v. Purcell, 526 F.3d 953, 964 (6th Cir. 2008).
94. *See, e.g.*, *Snype*, 441 F.3d at 136; *Melgar*, 227 F.3d at 1041–42.
95. *See* United States v. Smairat, 503 F. Supp. 2d 973, 991 (N.D. Ill. 2007) (concluding that it was unreasonable for the officers to proceed with a search without further inquiry because they did not reasonably believe the consenting party had the apparent authority to consent).
96. United States v. Yang, 478 F.3d 832, 835 (7th Cir. 2007).
97. *Snype*, 441 F.3d at 126.
98. *Id.* at 127.
99. *Id.*
100. *Id.* at 131.
101. *Id.* at 136.
102. *Id.* (citing United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987)).
103. *Snype*, 441 F.3d at 136.

and exclusively belonged to [the guest]."[104] Thus, the defendant in *Snype* could not merely assert that there was no objectively reasonable basis for searching the containers; he bore the burden of presenting evidence that established they "were obviously and exclusively his."[105] Because the containers were not marked and the room in which they were found housed objects "ranging from children's toys to a laptop computer found inside a carrying case,"[106] the court concluded that the defendant failed to demonstrate that the containers were obviously and exclusively his, or that the police could not reasonably rely upon the girlfriend's open-ended consent in searching them.[107]

b. The Seventh Circuit's Approach: *United States v. Melgar*

In *Melgar*, the police arrived at a hotel room looking for counterfeit checks and asked several women in the room for permission to search their purses.[108] An officer then asked the woman who rented the room for her permission to search it; the officer did not specifically ask for permission to search closed containers found inside the room or inquire as to whether there were additional occupants.[109] The police looked under a mattress and discovered an unmarked floral purse that contained a counterfeit check and an identification form that indicated the defendant—not the consenting woman—was the purse's owner.[110]

After determining that the consenting woman had the apparent authority to consent to the search of the hotel room,[111] the Seventh Circuit turned its attention to the question of her apparent authority over the purse:

> In a sense, the real question for closed container searches is which way the risk of uncertainty should run. Is such a search permissible only if the police have positive knowledge that the closed container is also under the authority of the person who originally consented to the search . . . , or is it permissible if the police do *not* have reliable information that the container is *not* under the authorizer's control.[112]

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104. *Id.* (describing *Zapata-Tamallo*, 833 F.2d at 27).
105. *Id.*
106. *Id.*
107. *Id.* at 137. *But see* United States v. Taylor, 600 F.3d 678, 685 (6th Cir. 2010) (reaching the opposite conclusion under similar factual circumstances).
108. United States v. Melgar, 227 F.3d 1038, 1039 (7th Cir. 2000).
109. *Id.*
110. *Id.* at 1040.
111. *Id.* at 1041.
112. *Id.*

In concluding that the woman's consent extended to the purse, the court reasoned that the police knew that the consenting woman had rented the room, the target of their search—counterfeit checks—could easily fit in a purse, and the discovered purse was unmarked.[113] Ultimately, the court found that "the police had no reason to know that the floral purse they found under the mattress did not belong to [the consenting party]."[114] Additionally, the court contended that "[a] contrary rule would impose an impossible burden on the police" because they would not search any closed containers without first determining the ownership of each one.[115]

Thus, the Second and Seventh Circuits have created a rule that permits the police to search closed containers after obtaining consent to search a residence so long as the containers do not *obviously* belong to another individual. In the face of ambiguous ownership, an officer may proceed unless it is objectively unreasonable to assume that the individual's consent would extend to a particular container.

2. *The Ambiguity Standard*

The Sixth Circuit, by adopting the ambiguity standard, requires an officer to cure any uncertainty regarding the ownership of a closed container before searching it.[116] While courts employing the obviousness standard proscribe a closed-container search only when an officer has positive knowledge that a container belongs to another,[117] courts employing the ambiguity standard use positive knowledge in another way; namely, when the circumstances present any measure of ambiguity, the police must obtain positive knowledge that a questionable container belongs to the consenting individual.[118]

a. *United States v. Purcell*

In *Purcell*, after the police arrested the defendant, his girlfriend consented to a search of their hotel room.[119] The police observed two duffel bags and a backpack in the room, and the girlfriend stated that

113. *Id.* at 1041–42.

114. *Melgar*, 227 F.3d at 1041.

115. *Id.* at 1042.

116. *See, e.g.*, United States v. Taylor, 600 F.3d 678 (6th Cir. 2010); United States v. Purcell, 526 F.3d 953 (6th Cir. 2008).

117. An officer may obtain such positive knowledge from the consenting party's express abdication of authority or the overwhelming evidence of the circumstances. *See* discussion *infra* Part IV.A.

118. *See, e.g.*, United States v. Waller, 426 F.3d 838, 846 (6th Cir. 2005) (finding enough ambiguity when the police knew the defendant had stored some personal items in the consenting party's apartment).

119. *Purcell*, 526 F.3d at 957.

one contained a firearm.[120] She also indicated that one of the duffel bags was hers, and upon searching it, an officer found marijuana and men's clothing.[121] During his search, the officer "realized that [the girlfriend] had misstated her ownership of the bag, [but] he did not ask her to verify whether she owned any of the other bags in the room" before continuing to search them.[122]

The Sixth Circuit acknowledged that the girlfriend had the apparent authority to search the room, but noted that "apparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity."[123] Once the officer discovered men's clothing in the bag claimed by the girlfriend, "ambiguity clouded [her] authority to consent to the search of the backpack."[124] As such, the police were obligated to obtain additional consent to search the other items in the room.[125]

The government and dissent argued that the defendant and his girlfriend were in an intimate relationship, contributing to a "good-faith basis for initially believing a would-be consenter's assertion of authority," as many couples pack together.[126] However, while the majority conceded that couples may share luggage, it found the potential travel habits of some to be unconvincing.[127]

b. *United States v. Taylor*

In *Taylor*, the police arrived at the defendant's girlfriend's apartment and arrested the defendant.[128] The officers then obtained the girlfriend's consent to search the apartment, suspecting that the defendant may have possessed a firearm; they did not ask her or the defendant for permission to search the defendant's belongings.[129] The police entered a spare bedroom and noticed a closet "strewn with men's clothes, children's clothes, and toys."[130] They then found a

120. *Id.* at 957–58.

121. *Id.* at 958.

122. *Id.* The police eventually discovered a firearm in the backpack, but the facts later revealed that the defendant was the sole owner of the first bag searched, as well as the backpack. *Id.*

123. *Id.* at 963.

124. *Id.* at 964.

125. *Purcell*, 526 F.3d at 964.

126. *Id.* at 964–65; *id.* at 966 (Sutton, J., concurring in part and dissenting in part) ("[I]t would seem reasonable for officers to infer that a couple sharing a bed would share access to unmarked, unlocked and androgynous-looking luggage.").

127. *Id.* at 965 n.5 (majority opinion).

128. United States v. Taylor, 600 F.3d 678, 679 (6th Cir. 2010).

129. *Id.*

130. *Id.*

men's size ten-and-a-half shoebox on the closet's floor, opened it, and discovered a firearm.[131]

The Sixth Circuit first noted the circumstantial ambiguity: the closet contained a mix of men's, women's, and children's clothes, and "nothing in the closet indicated that the items within it belonged to [the defendant's girlfriend] or were regularly used by her."[132] The court determined that a reasonable person would have doubts about the ownership of the shoebox and added that "the police would likely not have opened the closed shoebox if they believed it belonged to [the girlfriend]. Rather, they opened the shoebox precisely because they believed it likely belonged to [the defendant]."[133] While acknowledging that shoeboxes are not subject to a high degree of privacy,[134] especially when unsealed,[135] the court nevertheless found the police's failure to cure the factual ambiguity to be fatal to the girlfriend's apparent authority to consent to the search and granted the defendant's motion to suppress the firearm.[136]

In reaching its decision, the court relied upon *United States v. Waller*, another Sixth Circuit decision that rejected a resident's apparent authority to consent to the search of an unmarked suitcase even though the suitcase was found in the consenting resident's closet.[137] The *Waller* court determined that, because the police knew that the defendant was storing items in another's apartment, enough ambiguity existed to warrant further inquiry.[138]

In summary, the circuit courts have developed two standards to assess officers' conduct when they encounter closed containers of ambiguous ownership during a consensual search. While the Second and Seventh Circuits permit the search of any closed containers that do not *obviously* belong to someone other than the consenting individual, the Sixth Circuit requires officers to cure *any measure of ambiguity* they encounter during their search. These standards attempt to reconcile the heightened expectations of privacy afforded to closed contain-

131. *Id.* at 679–80.

132. *Id.* at 682.

133. *Id.*; *accord* United States v. Waller, 426 F.3d 838, 849 (6th Cir. 2005) ("Why would the police open the suitcase if they reasonably believed it belonged to [the consenting party, as opposed to the defendant]?").

134. *Taylor*, 600 F.3d at 683.

135. *Id.* at 684; *accord* United States v. Cork, No. 00-5099, 2001 U.S. App. LEXIS 20443, at *19–20 (6th Cir. Sept. 6, 2001) (finding no expectations of privacy in an unsealed, unmarked shoebox).

136. *Taylor*, 600 F.3d at 685.

137. *Waller*, 426 F.3d at 847.

138. *Taylor*, 600 F.3d at 682 (citing *Waller*, 426 F.3d at 847–49).

ers with law enforcement's need to conduct an efficient, thorough search of a residence after obtaining freely given consent to do so.[139]

III. ANALYSIS: CIRCUIT COURTS SHOULD APPLY THE OBVIOUSNESS STANDARD

Courts should apply the obviousness standard because it more strictly accords with the Supreme Court's mandate of objectivity. In *Illinois v. Rodriguez*, the Court found "sufficient probability, not certainty, [to be] the touchstone of reasonableness."[140] While some ambiguity may exist as to the ownership of a particular container,[141] officers should only be required to terminate their search if it would be unreasonable to continue due to obvious problems of authority.[142] This Part advocates for the obviousness standard in the context of the ambiguity standard's shortcomings. The first section asserts that the ambiguity standard improperly allocates the burden of defining the scope of consent to law enforcement.[143] The second section argues that the ambiguity standard misinterprets *Rodriguez*, which permits an officer to execute a consensual search until it is objectively unreasonable to continue.[144]

A. The Ambiguity Standard Unreasonably Shifts the Burden of Defining the Scope of Consent

The Supreme Court has emphasized the significant role that consent plays in efficiently obtaining reliable evidence.[145] However,

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139. Though these situations may also implicate notions of common law trespass, *see supra* notes 15–18, open-ended consent from an individual with apparent authority shifts the discussion away from whether an intrusion occurred and toward whether the officer was reasonable in extending that consent to a particular closed container. This Comment will refer only to the expectations of privacy associated with closed containers when discussing a potential violation of an individual's Fourth Amendment rights.

140. Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) (quoting Hill v. California, 401 U.S. 797, 803–04 (1971)).

141. *Id.* at 186 ("[M]any situations which confront officers in the course of executing their duties are more or less ambiguous . . . ." (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949))).

142. *See* United States v. Purcell, 526 F.3d 953, 967 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part) ("The question after all is not whether the officers were *certain* that [the consenting party] exercised joint access or control for most purposes . . . ; it is whether there was enough *uncertainty* to undermine the officers' reasonable . . . belief that [she] had authority to consent." (third and fourth alterations in original) (citation omitted) (internal quotation marks omitted)).

143. *See infra* notes 145–89 and accompanying text.

144. *See infra* notes 190–212 and accompanying text.

145. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search

while courts have traditionally afforded wide latitude to police officers after they obtain an individual's "unrestricted consent,"[146] that consent does not allow police officers to break into safes or tear through furniture in search of contraband.[147] Thus, after obtaining open-ended consent, the crucial inquiry for law enforcement is one of scope:[148] Can an officer construe an individual's consent as automatically extending to closed continers on the premises, or must the officer renew and redefine the original consent with respect to each container?[149]

The answer lies in how courts have traditionally allocated the responsibilities of both law enforcement and private citizens during their interactions.[150] "At one end of the spectrum" is the need for efficient, effective law enforcement, while "[a]t the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."[151] Because "[t]he Fourth Amendment was designed to protect people against unrestrained searches and seizures,"[152] the police must meet a high burden when obtaining an individual's consent.[153] Conversely, that individual must satisfy a notably smaller burden by either limiting that consent

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authorized by a valid consent may be the only means of obtaining important and reliable evidence.").

146. *See, e.g.*, United States v. Snype, 441 F.3d 119, 137 (2d Cir. 2006) (refusing to find that officers could not reasonably rely on the consenting party's unrestricted consent to search all items on the premises because the defendant failed to demonstrate that any items obviously belonged to him); United States v. Lewis, 386 F.3d 475, 481 (2d Cir. 2004) (requiring no warrant or probable cause upon receipt of voluntary, effective consent).

147. *See* Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 345 (1984) (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1(c), at 625 (1978)).

148. *See generally* Goldberger, *supra* note 147 (discussing issues related to the scope of warrantless searches).

149. In *United States v. Melgar*, Judge Wood discussed the consequences of such a rule, noting that "[i]t would mean that [officers] could *never* search closed containers within a dwelling (including hotel rooms) without asking the person whose consent is being given *ex ante* about every item they might encounter." 227 F.3d 1038, 1042 (7th Cir. 2000).

150. *Compare* United States v. Welch, 4 F.3d 761, 763 (9th Cir. 1993) (listing some factors that demonstrate voluntariness), *and* United States v. Groves (*Groves II*), 530 F.3d 506, 509–10 (7th Cir. 2008) (listing some factors that demonstrate authority), *with* United States v. Anthony, No. 3:10-CR-013-K, 2010 U.S. Dist. LEXIS 112736, at *11 (N.D. Tex. Oct. 21, 2010) (noting that the consenting party "did not instruct the officers to limit their search to certain areas or items in the hotel room, nor did she identify any objects that did not belong to her"), *and* United States v. Davis, 967 F.2d 84, 88 (2d Cir. 1992) (noting that the consenting party "never indicated—until after the search—what items in the footlocker belonged to him, nor did he limit his consent to search to those items").

151. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

152. Wolf v. Colorado, 338 U.S. 25, 40 (1949) (Black, J., concurring).

153. *See infra* notes 156–65 and accompanying text.

or refusing to give it altogether.[154] However, the ambiguity standard attempts to shift an individual's relatively minor burden of appropriately limiting his own open-ended consent by requiring police officers to continuously question and define that consent.[155] Courts should not pile the responsibility of limiting the scope of consent on top of an already significant police burden, but rather continue to require that consenting individuals do so at the outset of their interactions with law enforcement. Consenting parties are in the best position to know the limits of their authority and willingness to cooperate with law enforcement, and the burden of defining the scope of consent should be allocated accordingly.

1. Law Enforcement Has a Significant Constitutional Burden

While courts have acknowledged the heightened importance of consent in effectuating the duties of law enforcement, they have also imposed a two-pronged burden on officers seeking to obtain it.[156] First, law enforcement must show by a preponderance of the evidence that the consent was voluntary.[157] Courts generally look to the totality of the circumstances when evaluating whether consent was freely given,[158] but they have also enumerated a number of factors.[159] Further, any level of coercion nullifies consent,[160] including threatening language or the mention of adverse consequences.[161] This is especially true when consent authorizes the search of a home; courts are much more likely to find coercion when evidence is recovered from a private residence, and police must be especially cautious in such a situation.[162]

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154. *See infra* notes 166–89 and accompanying text.

155. *See infra* notes 156–89 and accompanying text.

156. *See, e.g.*, Commonwealth v. Sardone, No. 98-1073, 1999 Mass. Super. LEXIS 205, at *6 (Mass. Super. Ct. Mar. 25, 1999) ("When police rely on consent, the [government] must show 'consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority.'" (quoting Commonwealth v. Sanna, 674 N.E.2d 1067, 1072 (Mass. 1997))).

157. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222–26 (1973).

158. *E.g.*, *id.* at 226.

159. *See, e.g.*, United States v. Welch, 4 F.3d 761, 763 (9th Cir. 1993) ("Some of the factors to be weighed are (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether *Miranda* warnings have been given; (4) whether the person was told that he had the right not to consent: (5) whether he was told a search warrant could be obtained."). For a statistical analysis of how district courts assess these and other factors, including consent forms, language, and custody, see Sutherland, *supra* note 22.

160. *See Schneckloth*, 412 U.S. at 248.

161. *See* Sutherland, *supra* note 22, at 2211–12.

162. *Id.* at 2219.

Second, law enforcement must demonstrate by a preponderance of the evidence that the consenting individual had the requisite authority to consent.[163] In evaluating this factor, courts look to whether an objectively reasonable officer would believe that the consenting party had such authority.[164] This is a difficult burden often fraught with unusual situations and disingenuous consenting parties; officers repeatedly confront consenting individuals with unique interests in the residence, and for this reason, law enforcement must firmly establish authority at the outset to avoid working an injustice upon absent parties.[165]

Thus, law enforcement's initial burden is difficult to meet, but justifiably so due to the importance of individual privacy. The Supreme Court requires a balance between the legitimate need for searches and the equally important requirement of assuring the existence of authority and absence of coercion. Accordingly, once an officer has satisfied himself with the voluntary nature of an authorized party's open-ended consent, courts should allow that officer to quickly and efficiently execute a search of the premises. However, some courts applying the ambiguity standard impose the additional burden of establishing the

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163. *See, e.g.*, United States v. Davis, 332 F.3d 1163, 1170 (9th Cir. 2003); People v. Gonzalez, 667 N.E.2d 323, 326 (N.Y. 1996).

164. *See, e.g.*, *Gonzalez*, 667 N.E.2d at 326.

165. Given the importance of establishing authority at the outset of a consensual search, courts have labored over the proper indicia of authority. In *United States v. Groves*, for example, the Seventh Circuit enumerated several factors that can inform a determination of apparent authority to consent. These factors include, but are not limited to:

> (1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present.

United States v. Groves (*Groves II*), 530 F.3d 506, 509–10 (7th Cir. 2008) (quoting United States v. Groves (*Groves I*), 470 F.3d 311, 319 (7th Cir. 2006)). However, these considerations may only apply to an apparent resident, boyfriend, or girlfriend. More difficult situations have arisen in the context of houseguests, parents, and children. With respect to consenting houseguests, the Supreme Court has enumerated an additional twelve factors that determine their authority to consent. *See* Minnesota v. Olson, 495 U.S. 91, 96 n.4 (1990) (listing the factors). With respect to consenting parents, several commentators have noted the complexities of the circumstances, which require police to "thoroughly develop an understanding of the relationship." *See* Jason C. Miller, *When Is a Parent's Authority Apparent? Reconsidering Third-Party Consent Searches of an Adult Child's Private Bedroom and Property*, CRIM. JUST., Winter 2010, at 34, 37. Finally, with respect to consenting children, circuit courts are split regarding whether such consent is per se invalid, wholly acceptable, or subject to a totality of the circumstances analysis. *See generally* Matt McCaughey, Note, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. L. 747 (1996).

scope of consent with respect to closed containers discovered in the residence.

2. *Consenting Individuals Have a Substantially Lighter Burden*

Courts have consistently held that it is the duty of consenting parties, not police officers, to adequately limit and define the scope of their consent.[166] For example, in *United States v. Freeman*, a case in the U.S. Court of Appeals for the Fifth Circuit, an officer approached the defendant's friend on a train platform and asked whether some bags in a train car were his.[167] The friend answered affirmatively and consented to the officer's search of the car.[168] The officer opened a backpack, which turned out to be the defendant's, and discovered two large blocks of cocaine.[169] The defendant argued that the backpack was not within the scope of his friend's consent because "consent to search the room did not authorize the search of a closed backpack inside the room."[170] However, the Fifth Circuit noted that the Supreme Court had "specifically rejected the notion that an officer should be required to request permission before searching each individual container."[171] The Fifth Circuit concluded that the defendant's friend knew the contents of the train car and that it was his responsibility to limit the scope of his consent.[172] The court further noted that "[a] reasonable officer could certainly assume that consent to search the room included consent to search any unlocked bags in the room."[173]

The small burden placed on a consenting party with respect to the scope of their own consent is not only fair, given the substantial burden law enforcement must satisfy before executing a consensual search,[174] but also logical because consent is optional and entirely within the discretion of the consenting party.[175] Additionally, the consenting party is in the best position to know those things over which he may claim authority and those things that he may wish to remain

166. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 252 (1991); United States v. Davis, 967 F.2d 84, 88 (2d Cir. 1992).

167. United States v. Freeman, 482 F.3d 829, 830–31 (5th Cir. 2007).

168. *Id.* at 831.

169. *Id.*

170. *Id.* at 833.

171. *Id.* (citing *Jimeno*, 500 U.S. at 252 (involving a similar situation during an automobile stop)).

172. *Id.*

173. *Freeman*, 482 F.3d at 834.

174. *See supra* notes 156–65 and accompanying text.

175. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (noting that consent "could be freely and effectively withheld").

private.[176] Requiring law enforcement to establish both authority and specific privacy interests would result in an endless guessing game at the expense of both parties. Nevertheless, the ambiguity standard seeks to shift this burden from knowledgeable consenting parties to already-burdened police officers. When an officer encounters any measure of ambiguity as to the ownership of a certain container—whether it be a shoebox,[177] duffel bag,[178] or luggage[179]—courts applying the ambiguity standard require the officer to discontinue his consensual search and specifically inquire about the container.[180] These courts simply ignore the notable absence of any expressed limitations to the search, as well as the objectively reasonable conclusion that the container belongs to the consenting party.[181] This unreasonable shift in scope disregards the Supreme Court's clear aversion to requiring police to request permission to search every container they encounter.[182] As the Court emphasized in *Randolph*, "[I]t would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if [the Court] were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received."[183] Nevertheless, courts employing the ambiguity standard require law enforcement to take affirmative steps in seeking out a resident's refusal before acting on her freely given, open-ended permission. Law enforcement must therefore second-guess freely given consent with ill-informed judgment as to what the consenting party may or may not have wished to keep private.

Most importantly, the responsibility of limiting the scope of consent should stay with consenting parties because it accords with the

176. *See Freeman*, 482 F.3d at 833.

177. United States v. Taylor, 600 F.3d 678, 685 (6th Cir. 2010) ("[T]he officers could easily have gone downstairs and asked [the consenting party] to clarify her authority over the shoebox." (internal quotation marks omitted)).

178. United States v. Purcell, 526 F.3d 953, 964 (6th Cir. 2008) ("[T]he agents never asked [the consenting party] to clarify her authority over any of the other bags in the room.").

179. United States v. Waller, 426 F.3d 838, 849 (6th Cir. 2005) ("It would not have been burdensome for the officers to have asked [the consenting party] whether the luggage belonged to him . . . prior to opening the bag.").

180. *See, e.g.*, *Taylor*, 600 F.3d at 685; *Purcell*, 526 F.3d at 964; *Waller*, 426 F.3d at 849.

181. *See, e.g.*, *Purcell*, 526 F.3d at 967 (Sutton, J., concurring in part and dissenting in part) (noting that the consenting party's confusion as to which bag was hers "would buttress a reasonable belief that no clear boundaries existed between the possessions of the pair").

182. *See* Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("[Defendants] argue . . . that if the police wish to search closed containers within a car they must separately request permission to search each container. But we see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness.").

183. Georgia v. Randolph, 547 U.S. 103, 122 (2006).

"shared social expectations" expounded in *Georgia v. Randolph*.[184] There, the Supreme Court declared that police officers need not inquire about "exceptional arrangement[s]" or "eccentric scheme[s]," such as co-tenants agreeing "that no one could admit a guest without the agreement of all," because such arrangements contradict customary social understanding.[185] Just as a welcomed guest may enter a residence without seeking potential nonconsenting co-tenants, so too a police officer may perform a consensual search of a residence without seeking the same.

When a police officer engages in a search with the unlimited consent of the resident, customary social understanding would typically afford that officer with the reasonable belief that the resident's open-ended consent extends to closed containers and would certainly not require the officer to seek out a revocation of that consent.[186] Just because certain facts create some modicum of ambiguity as to ownership, such as the presence of men's clothing in the consenting woman's duffle bag in *Purcell*,[187] courts should not immediately shift the burden of limiting the scope of consent to police officers and thereby hinder them in the performance of their duties pursuant to a shared social understanding. As the dissent in *Purcell* noted, the men's clothing merely indicated that the couple shared luggage; if the consenting woman was confused as to which bag held her belongings, "that confusion would buttress a reasonable belief that no clear boundaries existed between the possessions of the pair, which is hardly an improbable scenario when it comes to a traveling couple."[188] Customary social understanding would not suggest that the woman did not own the bag, but merely exercised joint access over it.[189]

Thus, courts unreasonably shift the burden of defining the scope of consent when they require police officers to discontinue a consensual search and redefine the parameters of consent with respect to each closed container. The Supreme Court has expressed its discontent with rules that force officers to request permission to search each

184. *Id.* at 111.

185. *Id.* at 111–12.

186. Unless the containers implicitly manifest their owner's nonconsent by means of a lock, label, or seal. *See infra* notes 224–225 and accompanying text. *But see* United States v. Jones, 356 F.3d 529, 534 (4th Cir. 2004) ("[T]he scope of a consent search is not limited only to those areas or items for which specific verbal permission is granted. Consent may be supplied by nonverbal conduct as well. Thus, a suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect [by locking the container] is a strong indicator that the search was within the proper bounds of the consent search." (citation omitted)).

187. United States v. Purcell, 526 F.3d 953, 964 (6th Cir. 2008).

188. *Id.* at 967 (Sutton, J., concurring in part and dissenting in part).

189. *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

container they encounter, and customary social understanding would rightly not require it.

B. *The Ambiguity Standard Misinterprets* Rodriguez*'s Mandate of Objectivity*

In *Illinois v. Rodriguez*, the Supreme Court issued an objective standard by which police should determine the validity of an individual's consent: "[W]ould the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?"[190] This standard has been extended to property within the premises; police must determine whether an objectively reasonable officer would believe that the consenting party had authority over any discovered closed containers.[191] Indeed, many courts simply assume authority over containers after authority over the premises has been established.[192] Courts that have adopted the ambiguity standard, however, often misinterpret *Rodriguez*'s objective test and examine the subjective intent of law enforcement during the search.[193] For example, in *United States v. Waller*, a Sixth Circuit case, the defendant stored some luggage in a friend's closet with the friend's permission.[194] The defendant was eventually arrested outside the friend's apartment on an outstanding warrant, and the police asked the friend whether they could search his home.[195] He agreed, noting that the defendant had kept some "property" within his apartment, but did not specify the nature of that property or where it might be located.[196] The police eventually found some unmarked luggage, opened it, and discovered the defendant's weapons.[197] The Sixth Circuit held that the trial court erred in failing to suppress the weapons, reasoning that "[t]he very purpose of the

190. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (second alteration in original) (internal quotation marks omitted).

191. *See, e.g.*, *Jones*, 356 F.3d at 534 ("[I]t was objectively reasonable for [the officer] to believe that [the consenting individual's] express consent to search the duffle bag extended to the locked metal box."); *see also supra* note 2 and accompanying text.

192. *See, e.g.*, United States v. Snype, 441 F.3d 119, 136 (2d Cir. 2006) (finding that, because there was no question that the resident of the apartment had the authority to consent to a search, "her open-ended consent would permit the search and seizure of any items found in the apartment with the exception of those 'obviously' belonging to another person").

193. *See, e.g.*, United States v. Taylor, 600 F.3d 678, 682 (6th Cir. 2010) ("[T]he police would likely not have opened the closed shoebox if they believed it belonged to the [consenting party]. Rather, they opened the shoebox precisely because they believed it likely belonged to [the defendant].").

194. United States v. Waller, 426 F.3d 838, 842 (6th Cir. 2005).

195. *Id.*

196. *Id.*

197. *Id.*

police presence was to search for (presumably) illegal possessions of [the defendant's]. Why would the police open the suitcase if they reasonably believed it belonged to [the consenting friend]?"[198]

The Sixth Circuit's visitation into the subjective intentions of police officers is both improper and patently contradictory to Supreme Court precedent. The issue is not whether an officer would have opened a container based on his particular beliefs, but whether a reasonable officer would have objectively determined that the container belonged to the defendant.[199] That is to say, upon obtaining an individual's freely given, open-ended consent to search his residence, an officer may search the premises until it is objectively unreasonable to continue.[200] In applying an objective reasonableness standard to the determination of the authority to and extent of consent, the Court cautioned that "many situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part."[201] Thus, courts must trust the objective determinations of law enforcement officers.[202]

However, the ambiguity standard requires courts to engage in conjecture regarding the subjective intent of officers. The fact that the officers in *Waller* may have subjectively believed that the suitcase belonged to someone other than the consenting party is irrelevant. The only appropriate inquiry that the court should have made was whether the officers were reasonable in believing that it belonged to the friend.

Moreover, this improper examination of subjective intent often ignores the nature of the alleged crime that necessitated a search in the first place. For example, in *United States v. Snype*, law enforcement officers "obtained an arrest warrant for [the defendant] on charges of armed bank robbery."[203] When executing the warrant at an apartment belonging to another, the officers saw a knapsack, a red plastic

198. *Id.* at 849.

199. *See* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

200. *See* United States v. Purcell, 526 F.3d 953, 967 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part) ("The question after all is not whether the officers were *certain* that [the consenting party] exercised joint access or control for most purposes . . . ; it is whether there was enough *uncertainty* to undermine the officers' reasonable . . . belief that [she] had authority to consent." (third and fourth alterations in original) (citation omitted) (internal quotation marks omitted)).

201. *Rodriguez*, 497 U.S. at 186 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

202. *See* United States v. Melgar, 227 F.3d 1038, 1041 (7th Cir. 2000) ("[T]he real question for closed container searches is which way the risk of uncertainty should run. Is such a search permissible only if the police have positive knowledge that the closed container is also under the authority of the person who originally consented to the search . . . , or is it permissible if the police do *not* have reliable information that the container is *not* under the authorizer's control.").

203. United States v. Snype, 441 F.3d 119, 126 (2d Cir. 2006).

bag, and a box taken from the bank during the robbery.[204] After obtaining the resident's consent to search the apartment, the officers found money and weapons inside the containers.[205] While a jurisdiction applying the ambiguity standard may have objected to the subjective intent of the officers—in that the officers *may have believed* that the containers belonged to the defendant—the Second Circuit emphasized the conspiratorial nature of the crime, which "necessarily raised the possibility that various persons in the apartment might share possessory interest in the items searched."[206]

Finally, an examination of subjective intent also ignores the "assumption of risk" approach adopted by the Supreme Court in *United States v. Matlock*.[207] In *United States v. Davis*, the Second Circuit squarely addressed this issue.[208] There, the defendant argued that the consenting party could not authorize the search of certain containers because law enforcement officers were expressly looking for his property in those containers.[209] Despite this contention, the court noted:

> One who shares a house or room or auto with another understands that the partner may invite strangers—that his privacy is not absolute, but contingent in large measure on the decisions of another. Decisions of *either* person define the extent of the privacy involved, a principle that does not depend on whether the stranger welcomed into the [area] turns out to be an agent or another drug dealer.[210]

When an individual leaves his property in the home of another without issuing any instructions as to its care or explicitly marking it as his property, he assumes the risk that the other person may search or invite another party to search that property.[211] His property is not shrouded in an extra layer of constitutional protection merely because

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204. *Id.* at 126–27.

205. *Id.*

206. *Id.* at 136–37. "To the extent the discovery of these items in the same room where [the defendant] was arrested suggests a connection between him and the bags, such a possibility hardly equates to [the defendant's] obvious, much less exclusive, ownership of the bags." *Id.* at 136. In reaching this conclusion, the court relied heavily upon *United States v. Zapata-Tamallo*, which required the defendant "to adduce credible evidence demonstrating that these items were obviously and exclusively his." *Id.* (citing United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987)).

207. United States v. Matlock, 415 U.S. 164, 171 (1974); *see also* United States v. Davis, 967 F.2d 84, 88 (2d Cir. 1992).

208. *See Davis*, 967 F.2d at 88.

209. *Id.*

210. *Id.* (alteration in original) (quoting United States v. Chaidez, 919 F.2d 1193, 1202 (7th Cir. 1990)).

211. *Id.* ("[The consenting party's] actual possession of the footlocker, and the fact that [the defendant] never prohibited [that party] from examining [the defendant's] containers therein, lead us to conclude that [the defendant] assumed the risk that [the consenting party] would permit others to search the trunk and its contents.").

it is his. It is subject to the same objective determinations that attach to the consent of an individual with apparent authority.

Thus, courts that have adopted the ambiguity standard misapply the mandate of objectivity issued by the Supreme Court in *Rodriguez*. Moreover, their misapplication ignores the nature of the suspected offense giving rise to the search. As the Court noted, consensual searches are always "more or less ambiguous,"[212] and courts concerning themselves with ambiguity should look to some greater degree of obvious doubt before destroying an individual's open-ended consent and impeding law enforcement in its duties. Because the ambiguity standard clearly does not accord with the consistent opinions of the Supreme Court and several other jurisdictions, this Comment will now turn to the obviousness standard, its practical implementation in the courts, and the policy reasons for properly defining the outer limits of obviously manifested privacy.

IV. IMPACT

Adopting the obviousness standard would promote quick and efficient searches for the benefit of both law enforcement and consenting individuals. The obviousness standard provides a bright-line rule to law enforcement in the execution of its duties and allows courts to avoid second-guessing officers by providing an objective lens through which courts may inspect their actions. However, as a practical matter, courts must firmly define the characteristics of obvious ownership in order to prevent the same sort of confusion that the ambiguity standard inherently creates. To that end, the first section of this Part attempts to define the requisite indicia of obviousness and contemplates the criteria to which both police and judges should turn in assessing a container's ownership.[213] The second section enumerates the general policy reasons for adopting these criteria and explains how they benefit the courts, police, and consenting individuals.[214]

A. Judicial Implementation of the Obviousness Standard

Once courts adopt the obviousness standard, officers are left with one crucial inquiry: Which containers obviously lie beyond the scope of an authorized party's consent? While the answer may seem intuitive, courts have struggled with the varying manners in which contain-

212. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

213. *See infra* notes 215–35 and accompanying text.

214. *See infra* notes 236–42 and accompanying text.

ers are closed or sealed.[215] This section offers two firm categories that place certain closed containers outside the scope of the consenting party's authority regardless of whether that party chose to limit his open-ended consent. Specifically, law enforcement must forgo the search of closed containers when those containers are locked, labeled, or sealed, or when the searching officer obtains positive knowledge—whether by a consenting party's express abdication of authority or some overwhelming circumstantial evidence of the same—that the container belongs to another.[216] This section also warns against the tendency of courts to bestow special protection to certain enumerated containers.[217] While some containers may connote a higher level of privacy, courts should be wary of creating a tiered privacy regime that is confusing to officers and easily warped by the parameters that consenting parties might place around their otherwise open-ended consent.

1. Locks, Labels, and Seals

When police officers encounter a closed container that is locked, sealed, or labeled with the name of someone other than the consenting party, they should discontinue their search with respect to that container and obtain additional consent to search it. Labels provide an easy case for obviousness because they patently indicate another's ownership, and officers cannot reasonably conclude that the consenting party's authority extends to that container.[218] Locks and seals, however, should be treated differently because an objectively reasonable police officer may not so easily determine that such a container obviously does not belong to the consenting party.

In order to properly examine these indicia of obviousness, the terms "locked" and "sealed" must be adequately defined. While there are varying degrees of manifested privacy among closed containers, a closed lid on a cigar box or a zipped backpack should not rise to the level of, say, taping the lid or padlocking the zipper. For the purposes

215. *See infra* notes 218–25 and accompanying text.

216. *See infra* notes 226–34 and accompanying text.

217. *See infra* note 235 and accompanying text.

218. *See* United States v. Melgar, 227 F.3d 1038, 1042 (7th Cir. 2000) (finding that the police had no reason to know that the purse did not belong to the consenting party because "there were no exterior markings on the purse that should have alerted them to the fact that it belonged to another person"); *see also* United States v. Romanelli, No. 98-50046, 1998 U.S. App. LEXIS 29565, at *7 (9th Cir. Nov. 17, 1998) ("The box was unmarked and sitting at the foot of [the consenting party's] bed. There was no outward indication that it belonged to anyone else. As a result, the officers could reasonably believe that the box was [the consenting party's] without further inquiry.").

of properly applying the obviousness standard, the term "lock" should refer to any secured fastening mechanism requiring a key or combination, and the term "seal" should refer to any method of securing a container other than those inherent to the container's design.[219]

While courts have occasionally disagreed about whether locked or sealed containers obviously receive heightened Fourth Amendment protection,[220] such containers necessitate further inquiry due to their overt manifestations of privacy. In *Katz*, the Supreme Court found a reasonable expectation of privacy when an individual demonstrated "an actual (subjective) expectation of privacy . . . that society [was] prepared to recognize as 'reasonable.'"[221] Accordingly, the Supreme Court has recognized that placing one's personal effects inside a locked container manifests "an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."[222] Locks, labels, and seals should give officers pause because they clearly indicate an expectation that no one but the container's owner would enjoy access to its contents. Even after obtaining open-ended, unlimited consent to search a residence, law enforcement cannot construe the resident's consent as obviously extending to these types of containers because they lie outside the scope of that consent.[223]

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219. For example, a backpack's zipper, a purse's clasp, and a cigar box's magnetic band are all inherent to the design of these containers.

220. *Compare* Commonwealth v. Sardone, No. 981073, 1999 Mass. Super. LEXIS 205, at *13 (Mass. Super. Ct. Mar. 30, 1999) ("The fact that the knapsack was not secured by a lock, while a relevant factor, is not determinative."), *with* United States v. Cork, No. 00-5099, 2001 U.S. App. LEXIS 20443, at *19–20 (6th Cir. Sept. 6, 2001) ("While a sealed container or locked suitcase may be entitled to a heightened expectation of privacy, here [the defendant] did not seal, tape, or lock the shoebox." (citation omitted)), *and* Glenn v. Commonwealth, 654 S.E.2d 910, 915 (Va. 2008) ("Had the backpack borne [the defendant's] name or other identifying marks, . . . there would likely be few circumstances where an objectively reasonable police officer could conclude [the consenting party] had the authority to consent to a search of the bag.").

221. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

222. United States v. Chadwick, 433 U.S. 1, 11 (1977), *overruled by* California v. Acevedo, 500 U.S. 565, 579 (1991) (holding that police may open such a container only when they have probable cause to do so).

223. *See, e.g.*, United States v. Basinski, 226 F.3d 829, 835 (7th Cir. 2000) ("Because a reasonable person would be less likely to believe that a defendant granted free access to the contents of locked containers, also relevant are the precautions taken to ensure privacy, such as locks or the government's knowledge of the defendant's orders not to open the container."); United States v. Presler, 610 F.2d 1206, 1213–14 (4th Cir. 1979) ("The very act of locking [two briefcases] and retaining either the key or the combination to the locks on the two briefcases was an effective expression of the defendant's expectation of privacy.").

Law enforcement should treat locks, labels, and seals as the Supreme Court treated present, nonconsenting residents in *Georgia v. Randolph*.[224] There, the Court opined that no reasonable person would construe one resident's invitation to enter as sufficient against another's express refusal.[225] Therefore, officers must yield to a present, nonconsenting resident even when another resident openly consents to a search. In the same way, police should not have the authority to break into a locked, labeled, or sealed container because the lock, label, or seal implies nonconsent. Like a present, nonconsenting resident, the container manifests its owner's nonconsent in direct contradiction to a consenting party's open-ended permission.

2. *Positive Knowledge*

Positive knowledge that a container does not belong to the consenting party also constitutes obviousness. While this notion seems self-evident, there are peripheral forms of positive knowledge that have caused some difficulty in the courts. For example, most would agree that a consenting party's bald assertion that a backpack belongs to another constitutes positive knowledge, but what if the consenting party made no such statement and the officer had seen another individual carrying a similar, if not the same, backpack earlier that day?[226] As courts applying the obviousness standard have held, inference is not fact, and probability is not positive.[227] When assessing the state of mind of a reasonable officer during a search, courts should look to what would have been objectively known and not what may have been subjectively inferred.

The ambiguity and obviousness standards treat the positive knowledge of law enforcement officers in significantly different manners. While the obviousness standard requires police officers to discontinue a consensual search when they know that a certain closed container *does not* belong to the consenting party,[228] the ambiguous standard requires police officers to discontinue a consensual search until they

224. *See* Georgia v. Randolph, 547 U.S. 103 (2006).

225. *Id.* at 113.

226. *See* United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987).

227. *See* Glenn v. Commonwealth, 654 S.E.2d 910, 915–16 (Va. 2008) (noting that, even though "[t]he backpack was located in a room that the police knew [the defendant] used," there was nothing indicating that the backpack did not belong to his grandfather).

228. *See, e.g.*, United States v. Davis, 332 F.3d 1163, 1170 (9th Cir. 2003) (finding a search to be unreasonable because the consenting party indicated which bedroom was occupied by the defendant when initially providing her consent to search, adding that the defendant kept all of his belongings in that bedroom).

know that a closed container *does* belong to the consenting party.[229] In adopting the obviousness standard, courts should only question whether the police positively knew that a container did not belong to the consenting party and make such knowledge an obvious barrier to a closed-container search. While a consenting party may provide a law enforcement officer with positive knowledge as to his lack of authority over certain areas or containers, any other such knowledge must stem from the nonconsenting party's obvious and exclusive ownership. Though such ownership may be overwhelmingly evident from the circumstances, courts should not simply assume another party's ownership ex post absent an obvious and objective determination of the same ex ante.

This approach accords with the proper burdens placed upon police officers and citizens.[230] Before obtaining valid consent, law enforcement must establish not only voluntariness, but also authority to consent.[231] After satisfying these requirements, the obviousness standard extends that consent to any containers not obviously belonging to another.[232] Only when a consenting party freely indicates that an area or container is within the exclusive possession of another will he have obviously abdicated his authority over it to the point of granting positive knowledge to an officer.[233]

In sum, officers should be able to extend a consensual search to closed containers when the officers do not have positive knowledge of

229. *See, e.g.*, United States v. Taylor, 600 F.3d 678, 683 (6th Cir. 2010) (finding a search to be unreasonable because the officers should have questioned the consenting party about her ownership of a shoebox before opening it).

230. *See supra* notes 145–89 and accompanying text.

231. *See supra* notes 156–65 and accompanying text.

232. *See supra* notes 94–115 and accompanying text.

233. *See Davis*, 332 F.3d at 1166. *United States v. Zapata-Tamallo* is instructive as to this approach, demonstrating how positive knowledge stems only from "obvious and exclusive" possession in the absence of other obvious and objective indicia of ownership. *See* 833 F.2d 25 (2d Cir. 1987). There, a resident host consented to the search of his guest's duffel bag, which the searching officer had seen the guest carry into the apartment. *Id.* at 26–27. In upholding the officer's search of the bag, the Second Circuit noted that there was "no evidence that [the defendant] had an exclusive possessory interest in the bag. . . . Although a third party's consent to a search is generally invalid when it is 'obvious' that the searched item belongs to a guest, [the defendant] has failed to prove that the bag was 'obviously' his." *Id.* at 27 (citation omitted). *Zapata-Tamallo* represents the outer limit of a finding of no positive knowledge. While the officer saw the defendant carry the bag into the apartment, arguably establishing the defendant's ownership over it, there was no indication of exclusive ownership. The bag was not marked or labeled, and it did not manifest an expectation of privacy with a lock or seal. *See id.* Neither the consenting party nor the defendant gave the officer any reason to believe that the bag was obviously not subject to mutual use. *See also* United States v. Matlock, 415 U.S. 164, 171 (1974). Therefore, the court properly concluded that the defendant did not meet his burden of establishing positive knowledge of obvious and exclusive ownership.

another's ownership or privacy interest in the containers. Additionally, officers' ability to search should be limited to only those containers that are not clearly labeled or sealed by some method other than one inherent to the container's design. These relatively simple rules will enable law enforcement to quickly and efficiently execute a lawful search while minimizing intrusions upon the privacy of consenting and nonconsenting citizens.[234] However, while these rules can and should universally apply to any conceivable container—whether it be a purse, shoebox, or suitcase—it is important to note the tendency of some courts to assign varying levels of privacy to certain containers in certain situations.[235] To some extent, it is reasonable to note the greater privacy interests that a suitcase or purse may enjoy over, say, a shoebox. However, these tiered privacy regimes should be irrelevant after an officer obtains open-ended consent to search a residence. Such a hierarchy dilutes the strength of that consent, reducing it to a mere threshold authorization that enables officers to look around until they stumble upon anything with a lid. Absent a lock, label, seal, or limiting instruction from the consenting party, the potentially sensitive contents of any given container should not alter the unlimited nature of freely given consent.

B. Policy Implications of the Obviousness Standard

The obviousness standard promotes the policy of quick and efficient searches by refusing to place an improper and unreasonable burden upon police officers.[236] Fourth Amendment jurisprudence is a balance between effective law enforcement and the privacy interests of citizens; it prevents government intrusion only when it is unreasonable,

234. *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.").

235. *See, e.g.*, United States v. Taylor, 600 F.3d 678, 683 (6th Cir. 2010) ("A shoebox is concededly not 'luggage.' . . ."); United States v. Block, 590 F.2d 535, 541 n.8 (4th Cir. 1978) ("Obviously not every 'enclosed space' within a room or other area—*e.g.*, pockets in clothes, unsecured shoeboxes, and the like—can claim independent status as objects capable of search not within reach of the authorized area search.").

236. *Cf.* Kentucky v. King, 131 S. Ct. 1849, 1861 (2011) (declining to endorse a rule that "law enforcement officers impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable" because it would be "extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule" (internal quotation marks omitted)).

while otherwise seeking to maximize its efficacy.[237] When an individual consents to a search of his home, it is in the interests of both that individual and police officers to execute a quick, thorough search without lingering over every enclosed space. While the ambiguity standard requires innumerable inquiries that would repeatedly halt a lawful search—or possibly cause enough frustration that the consenting individual terminates the search altogether—the obviousness standard allows officers to quickly retrieve evidence and remove themselves from the premises.

As the *Rodriguez* Court observed, "[M]any situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part."[238] There are numerous situations in which an officer may find some modicum of ambiguity as to the ownership of a particular container during the course of a lawful search. Does a man's shoebox in a woman's closet require further inquiry? What about a cigar box in the residence of a known nonsmoker, or two purses on a woman's table? While the obviousness standard forgives small measures of ambiguity in favor of conducting a speedy search of the residence, the ambiguity standard requires repeated inquiry. In rejecting the ambiguity standard, the Seventh Circuit determined it to be "an impossible burden on the police" because of the potentially endless dialogue it generates between the consenting individual and the officer.[239]

The obviousness standard allows for objective determinations. A labeled container clearly belongs to another party; a locked or sealed container manifests an expectation of privacy outside the scope of open-ended consent; and positive knowledge about a container's ownership leaves no room for doubt. The ambiguity standard, however, blurs these bright lines by miring courts in odd discussions about what the peculiarities of the circumstances suggested[240] and charging them

237. *See supra* notes 20–24 and accompanying text.

238. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

239. *See* United States v. Melgar, 227 F.3d 1038, 1042 (7th Cir. 2000) ("[Such a] rule would mean that [officers] could never search closed containers within a dwelling (including hotel rooms) without asking the person whose consent is being given ex ante about every item they might encounter.").

240. *See, e.g.*, *Taylor*, 600 F.3d at 679–80 ("This closet was strewn with men's clothes, children's clothes, and toys. On the floor of the closet, in a corner, the officers found a closed shoebox with a label indicating that it was for a pair of Nike brand Air Jordan men's basketball shoes, size ten-and-a-half. The shoebox was partially covered by a piece of men's clothing.").

with the clairvoyant task of reading an officer's subjective intent.[241] Such a standard is unmanageable for police, citizens, and the courts.

Finally, objective determinations lead to efficient, consensual searches. Although the Fourth Amendment implicitly distrusts any intrusion by the government, the Supreme Court has emphasized the importance of a search pursuant to freely given consent.[242] The obviousness standard respects the nature of that open-ended consent and does not require an officer to disassemble and reconstruct it to fit what he may perceive to be an area of elevated privacy. As a result, the interaction between the police and a consenting citizen is terminated quickly, evidence is located efficiently, and law enforcement is able to execute its duties effectively.

V. CONCLUSION

Courts should be wary about requiring law enforcement to terminate consensual searches simply because the circumstances presented some measure of ambiguity. The Supreme Court issued a rule of objective reasonableness in *Illinois v. Rodriguez* that governs an officer's assessment of a resident's initial authority to consent, as well as the scope of that consent. Courts that apply the ambiguity standard not only misinterpret this mandate, but also place an unreasonable burden upon law enforcement. Although courts have long required the consenting party to limit the scope of his consent, the ambiguity standard requires special ex ante inquiry from any officer in an even mildly ambiguous situation. In advocating for the obviousness standard, this Comment urges courts to find an officer's continued search unreasonable only when that officer had positive knowledge regarding a container's ownership or if the container was clearly labeled, locked, or sealed. A contrary rule only impedes law enforcement in the execution of its duties and extends indefinitely an otherwise speedy search.

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241. *See, e.g.*, United States v. Waller, 426 F.3d 838, 849 (6th Cir. 2005) ("Why would the police open the suitcase if they reasonably believed it belonged to [the consenting party, as opposed to the defendant]?").

242. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

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